

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AUTO PARTS CENTER, INC.	:	DETERMINATION
	:	DTA NO. 812398
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1989	:	
through February 29, 1992.	:	

The Division of Taxation, by its representative, William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion dated April 28, 1994 for an order of summary determination on the grounds that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the notice of determination. Parisi, Surico & DeRose (Alfred J. Parisi, Esq., of counsel), representative for petitioner, Auto Parts Center, Inc., did not respond to the motion. Based upon the motion papers, the affidavits, and all pleadings and documents submitted, Daniel J. Ranalli, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely protested a notice of determination assessing sales and use taxes due.

FINDINGS OF FACT

1. On March 1, 1993, the Division of Taxation ("Division") issued to petitioner, Auto Parts Center, Inc., a notice of determination assessing sales and use taxes due for the period March 1, 1989 through February 29, 1992 in the amount of \$565,059.50, including penalty and interest. Also on March 1, 1993, a copy of this notice was sent to Bernard Singer, petitioner's legal representative at that time.

2. On June 3, 1993, petitioner mailed a request for conciliation conference to the Bureau of Conciliation and Mediation Services.

3. The conciliation conferee issued an order on July 23, 1993 dismissing petitioner's request as late filed.

4. On October 21, 1993, petitioner filed a petition with the Division of Tax Appeals for revision of the determination or for refund of sales and use taxes due. The petition sets forth the basis for petitioner's protest on the merits, namely that no meeting was held between the auditor and the taxpayer's representative to discuss the auditor's findings that sales to dealers outside of New York State were unsubstantiated. The petition further asserts that the "request for conciliation conference was filed on time but delayed in the mail."

5. The Division's answer, dated February 24, 1994, affirmatively states that the request for conciliation conference was untimely filed, and asks that the petition be denied and the notice sustained.

6. On April 28, 1994, the Division brought a motion for summary determination pursuant to 20 NYCRR 3000.5(c)(1) on the grounds that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the notice of determination, as required by Tax Law §§ 170(3-a) and 1138(a)(1).

7. In support of its motion for summary determination, the Division submitted: the affidavit of its representative; affidavits of Donna Biondo and Daniel LaFar, employees of the Division; copies of the notice of determination issued to Auto Parts Center, Inc. and also to its representative, Bernard Singer; a copy of the certified mail record containing a list of the notices allegedly issued by the Division on March 1, 1993; and a copy of the envelope which contained petitioner's request for conciliation conference and the face page of such request.

8. The affidavit of Donna Biondo, Head Clerk of the Case and Resource Tracking System Unit of the Division, sets forth the Division's general procedure for mailing notices of determination to taxpayers, including the delivery of the notices to the post office and the Division's receipt of the postmarked documents from the post office following mailing.

In addition, the affidavit explains that the computerized preparation of notices of

determination includes the simultaneous preparation of a certified mail record, the record listing those taxpayers to whom notices are being issued and the certified control number assigned to each notice. According to Ms. Biondo, the pages of the certified mail record remain fan-folded, or connected to each other, before the notices are accepted by the United States Postal Service and even after the mail record is returned to the Division. She states that it is only upon her request that the pages of the mail record are disconnected from one another.

9. Ms. Biondo attests to the truth and accuracy of the copy of the certified mail record attached to her affidavit which contains a list of the notices allegedly issued by the Division on March 1, 1993, including one addressed to petitioner and one addressed to petitioner's representative. This copy of the certified mail record consists of 21 pages, through which the certified control numbers run consecutively from P 911 206 291 on page 1 to P 911 206 516 on page 21, with 11 entries per page except page 21, which contains 6 entries.

Page 14 contains certified mail control number P 911 206 437, notice of determination number L 007044130, addressed to petitioner, Auto Parts Center, Inc., 1000 Long Island Avenue, Deer Park, N.Y. 11729-3718. Page 13 contains certified mail control number P 911 206 431, notice of determination number L 007044130, addressed to petitioner's legal representative, Bernard Singer, 592 Prescott Place, N. Woodmere, N.Y. 11581. The certification and notice numbers listed match those on the notices issued to petitioner and its representative, respectively.

Each of the 21 pages of the certified mail record submitted is date stamped March 1, 1993 by the United States Postal Service, and the record print time is 12:44:17. Ms. Biondo explains in her affidavit that the print date for certified mail records is approximately ten days prior to the mail date, in order to give sufficient time to review the notices by hand and to process the postage. She notes that the print date here, February 20, 1993, was changed to March 1, 1993 to conform to the actual date of delivery of the notices to the United States Postal Service.

It is noted that while the certified mail record submitted contains, on the last page, a total for the number of pieces listed, it does not contain a total for the number of pieces received at

the post office.

10. The affidavit of Daniel LaFar, a Principal Mail and Supply Clerk in the Division's Mail and Supply Room, attests to the regular procedures followed by the mail and supply room staff in the ordinary course of its business of delivering outgoing certified mail to branch offices of the United States Postal Service. Mr. LaFar states that the certified mail record is the Division's record of receipt by the General Mail Facility of the United States Postal Service for pieces of certified mail. Mr. LaFar also asserts that the staff's regular procedures were followed in mailing the notice of determination in question to petitioner and its representative on March 1, 1993.

11. The notices of determination sent to petitioner and its representative each stated, on two of the three pages submitted, that any request for conciliation conference or petition for a hearing must be filed by May 30, 1993.

12. The envelope in which petitioner's request for conciliation conference was mailed bears an office metered (Pitney Bowes) postmark of May 28, 1993 as well as a U.S. Postal Service cancellation postmark of June 3, 1993. This envelope as well as the face page of the request bear a Bureau of Conciliation and Mediation Services received stamp dated June 7, 1993.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.5(c)(1) after issue has been joined. The regulation provides, in pertinent part, that:

"Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any issue of fact." (Emphasis added.)

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851,

487 NYS2d 316, 317, on remand, 111 AD2d 138, 489 NYS2d 970, citing Zuckerman v. City of New York, 49 NY2d 557, 562, 427 NYS2d 595). If any material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (see, Gerard v. Inglese, 11 AD2d 381, 206 NYS2d 879, 881).

B. Pursuant to Tax Law § 1138(a)(1), a notice of determination:

"shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing, or unless the commissioner of taxation and finance of his own motion shall redetermine the same." (Emphasis added.)

A petitioner has the option of requesting a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") upon receipt of the notice of determination, rather than filing a petition (20 NYCRR 4000.3[a]). Tax Law § 170(3-a)(a) provides, in part, that BCMS shall provide a conference at the request of the taxpayer where the taxpayer has received:

"any written notice of a determination of tax due, a tax deficiency, a denial of a refund . . . or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed." (Emphasis added.)

A request for conciliation conference also must be filed within the 90-day period for filing a petition and effectively suspends the running of the limitations period for the filing of a petition (20 NYCRR 4000.3[c]; but see, 20 NYCRR 4000.6).

If a taxpayer fails to timely file a petition (or a request for a conciliation conference) protesting the notice of determination, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (see, Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

C. Tax Law § 1147(a)(1) provides as follows:

"Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be

obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice."

Where the taxpayer files a petition (or a request for a conciliation conference), but the timeliness of the petition (or request) is at issue, the Division has the burden of proving proper mailing of the notice in question (see, T.J. Gulf, Inc. v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d 97; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

The required proof of mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (see, Matter of Katz, *supra*; Matter of Novar TV & Air Conditioner Sales & Serv., *supra*).

D. Through the evidence it has submitted, the Division has established that the notice of determination in question was, in fact, mailed to petitioner on March 1, 1993.

First, the Division introduced adequate proof of its standard mailing procedures via affidavits of several Division employees involved in the notice generation and issuance process. In particular, the Biondo and LaFar affidavits generally describe the various stages of the issuance process and, in addition, attest to the veracity of the copy of the notice of determination, number L 007044130, sent to petitioner as certified number P 911 206 437 and to petitioner's representative as certified number P 911 206 431.

Second, the Division established that the general issuance procedure was followed on March 1, 1993 in the generation and mailing of petitioner's notice. Even though the certified mail record submitted does not contain, on the final page, a total for the number of items received at the post office, the entire certified mail record is in evidence, and the LaFar and Biondo affidavits attest to the fact that such mail record is accurate with respect to the notices of determination delivered to petitioner and to its representative. In addition, each of the 21 pages

of the mail record submitted -- most notably, pages 13 and 14 on which the notices sent to petitioner and its representative are listed -- are date stamped March 1, 1993 by the Roessleville Branch of the United States Postal Service in Albany, New York.

In short, the Biondo and LaFar affidavits, consistent in all respects with the information listed on the face of the notice in question, provide direct documentary evidence confirming the March 1, 1993 date and fact of mailing of the subject notice (see, Matter of Novar TV & Air Conditioner Sales & Serv., supra; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992). Moreover, the presence of the Postal Service date stamp on pages 13 and 14 of the certified mail record -- the pages containing the information regarding the notice of determination issued to petitioner -- directly supports the conclusion that the mailing of said notice occurred as claimed by the Division (see, Matter of Katz, supra).

E. Section 4000.7 of the Regulations of the Commissioner of Taxation and Finance specifies the manner for filing documents, including requests for conciliation conference ("requests"), with the Bureau of Conciliation and Mediation Services ("BCMS"). It provides that if a request is delivered by United States mail to BCMS after its prescribed due date, the date of the United States postmark as stamped on the envelope will be deemed the date of filing. Accordingly, the request is deemed to have been filed on June 3, 1993 and thus was late filed since it was not filed within the 90-day period prescribed by Tax Law §1138(a)(1).

F. The Division has, therefore, introduced evidence in support of its motion for summary determination -- namely, that it properly mailed the notice of determination at issue on March 1, 1993 and that the request for conciliation conference was not filed until June 3, 1993. Petitioner, however, has not responded to the Division's motion, making only the uncorroborated assertion in its petition that the request for conciliation conference was sent on time but was delayed in the mail. Under these circumstances, the Division, as the proponent of this motion for summary determination, has succeeded in carrying its burden of showing that it is entitled to judgment as a matter of law; there is no material issue of fact in dispute in this case.

G. Accordingly, the Division's motion for summary determination is granted and the petition of Auto Parts Center, Inc. is dismissed.

DATED: Troy, New York
June 30, 1994

/s/ Daniel J. Ranalli
ADMINISTRATIVE LAW JUDGE